BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

A. Several defendants cannot be convicted in a single indictment, for offenses committed independently of each other.

McElroy v. *United States,* 164 U. S. 76, 80, 17 S. Ct. 31, 32, 41 L. Ed. 355.

Nazzaro v. *United States* (C. C. A. 10), 56 F. (2) 1026, 1027.

B. Where the foregoing facts do not appear upon the face of the indictment, but do appear on the trial from the evidence, the defendants are entitled to the same benefit as if the indictment had fairly stated the facts.

United States v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283.

Coco v. *United States* (C. C. A. 8), 289 F. 33, 34.

Brimie v. *United States* (C. C. A. 7), 200 F. 726, 729.

C. Where the foregoing error exists, prejudice to the defendants is presumed.

McElroy v. *United States,* 164 U. S. 76, 81, 17 S. Ct. 31, 41 L. Ed. 355.

McCandless v. *United States,* 298 U. S. 342, 347, 56 S. Ct. 764, 70 L. Ed. 1205, 1209.

United States v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283.

Miller v. *United States* (C. C. A. 10), 120 F. (2) 969, 973.

Little v. *United States* (C. C. A. 10), 73 F. (2) 861, 866, 96 A. L. R. 889.

Todd v. *United States* (C. C. A. 8), 221 F. 205, 208.

The facts concerning the misjoinder appear in the *Statement of the Case* on pages 4-8 hereof and in the *Reasons for Granting the Writ* on pages 9-11 of this Petition and, hence, will not be repeated here.

Justice C. Major, in his opinion, dissenting in part, observed: "that the Appellee does not seriously dispute that there was a misjoinder but argues that there was no prejudice." (R. 151.) This misjoinder did not appear upon the face of the indictment. If it had so appeared, it would have been subjected to the principle set forth in the cases of *McElroy* v. *United States*, 164 U. S. 76, 80, 17 S. Ct. 31, 32, 41 L. Ed. 355, and *Nazzaro* v. *United States* (C. C. A. 10), 56 F. (2) 1026, 1027, which hold that several defendants cannot be convicted in a single indictment, for offenses committed independently of each other.

The objectionable situation, however, first appeared at the trial and, at proper times, the defendants' counsel made full objections to the error.

In a strikingly similar case, *United States* v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283, that Court observed that the prosecution was familiar with the proceedings before the grand jury, with the statements of the witnesses, with the exhibits and all the provable facts of its case against each of the defendants. The Court further there observed that because of the misleading character of the indictment and the failure of Government counsel frankly to admit his lack of any evidence against one of the defendants, the first clear picture of the situation was presented at the close of the Government's case.

What the Court said in the Perlstein case is equally true in the instant case. The *propriety* of such conduct by a District Attorney and the effect of such a misjoinder when first disclosed at the trial, have never been presented to this Court.

In the instant case, the Circuit Court of Appeals for the

Seventh Circuit disposed of the objection in the following language (R. 149-150):

> "We now consider appellants' contention that several defendants cannot be convicted in a single indictment for offenses committed by them independently of each other.
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> "The record discloses that at the close of the evidence for the Government, on motion of the counsel for the United States, an order of *nolle prosequi* was entered as to the appellant Bonarski and defendant Ostrowski on counts 1 and 2, and as to the defendant Ptaszynski on counts 1, 2, 7, 8 and 10. Thereupon, the appellants moved the court to instruct the jury to find them not guilty on counts 1, 2, 3, 7 and 8, on the ground that the evidence showed a misjoinder of offenses and defendants. The motion was denied.
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> "The argument is that while the indictment charged all of the defendants with a commission of all of the crimes, the evidence showed that the defendants Bonarski, Ostrowski, and Ptaszynski had nothing whatever to do with the offenses charged in counts 1 and 2; that Tuffanelli had no connection with the charge described in counts 3, 7 and 8; and that there was no evidence connecting Bonarski with count 8, nor any connecting Ptaszynski with any of the counts.
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> "In support of this contention the appellants rely upon *McElroy* v. *United States*, 164 U. S. 76, in which the court said that 'joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them.' An analysis of the McElroy case discloses that the offenses charged against the six defendants were wholly different, having no relation to each other. They included assault with intent to kill two different persons and arson of two different dwellings, each by a different combination of defendants. It is clearly distinguishable from the instant case.
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> "District attorneys, in drafting indictments, ought to keep in mind the admonition of the courts that it is not good practice to join in an indictment counts

charging distinct offenses against separate defendants, *Todd* v. *United States, supra;* and *Culjak* v. *United States,* 53 F. (2d) 554, and while we do not approve the practice followed in this case, we cannnot say the action of the court in overruling appellants' motion may be assigned as prejudicial error, since all of the counts charged closely related offenses, based upon a series of transactions constituting a preconceived system and plan to defraud the United States of the revenue imposed on distilled liquor."

For the sake of brevity, counsel for the petitioner adopt as their answer to the foregoing, the reply of Justice C. Major in his partial dissenting opinion. (R. 151, 152.) Counsel for the petitioner cannot improve thereon.

The following cases sustain, both the position of the petitioner and of the Justice who wrote the dissenting opinion:

United States v. *Perlstein* (C. C. A. 3), 120 F. (2) 276, 283.

Coco v. *United States* (C. C. A. 8), 289 F. 33, 34.

Brimie v. *United States* (C. C. A. 7), 200 F. 726, 729.

An unusual and confusing situation now exists in the Seventh Circuit. The instant decision holds that a misjoinder under the foregoing circumstances is neither erroneous nor prejudicial; this decision is in direct conflict with an earlier decision of the same Circuit Court of Appeals, the case of *Brimie* v. *United States,* 200 F. 726.

The prejudice to the petitioner and other defendants is, however, startlingly *manifest.* The jurors were so confused by the misjoinder and the prejudicial evidence introduced on all of the counts of the indictment, that they found the petitioner guilty on Counts 1, 2, 3, 7, 8 and 10; they found the defendant Bonarski guilty on Counts 3, 7, 8 and 10; they found the defendant Ostrowski guilty on Counts 3, 7, 8 and 10. The Circuit Court of Appeals was required

to reverse the judgment against the petitioner as to Counts 3, 7 and 8; as to Count 3 because of a fatal variance and as to 7 and 8 because there was no evidence to connect him therewith; the judgment against Bonarski was reversed as to Counts 3 and 8 for the same reasons. The Circuit Court of Appeals was compelled to make such decision, only as a result of the joinder of charges committed by certain defendants independently of each other.

If it were not for the misjoinder, Tuffanelli would never have been convicted of having committed the offense described in Count 2, which charged the defendants with carrying on the business of a distiller at 2332 West Grove Avenue. Only a set-up still was found at that address. No other property was found on the premises nor any other activity was shown in connection therewith. Even the Circuit Court of Appeals observed: "The record also discloses that investigators seized an illicit distillery at 2332 West Grove Avenue, on July 12, 1940, set for operation *but not running at that time.*" (R. 148.) It is safe to say that the petitioner would never have been convicted of Count 2 except for the confusion of the jurors resulting from the misjoinder complained of.

Tuffanelli was obviously prejudiced in his defense of the charge against him set forth in Count 1, that he possessed a set-up still at 2332 West Grove Avenue, Blue Island, Illinois. Except for one additional fact, the opinion of the Circuit Court of Appeals relates the substantial evidence in connection with Count 1 (R. 148):

> "The record also discloses that investigators seized an illicit distillery at 2332 West Grove Avenue on July 12, 1940, set for operation but not running at that time. It further discloses that one Bender, a water meter reader for the city of Blue Island, read the water meter on June 7, 1940, and found, in addition to the pipe leading into the yard at the premises, another pipe leading into a building in the rear. One June 8th Bender returned, and removed the connection that sup-

> plied the rear building with water. As he was leaving the premises he met Tuffanelli who said: 'Well, I saw you down at the meter pit, we have to have water back there in the building,' and added 'there was something in the building would spoil.' Tuffanelli also inquired of Bender if he had learned to take money yet. July 13th, after the still had been seized, Bender called at Tuffanelli's home for the purpose of reading Tuffanelli's meter, and while there, Tuffanelli said to Bender: 'Something happened yesterday, there will be an investigation, don't say anything.' "

Petitioner introduced a written document, the actual meter reading at Tuffanelli's home, written by the witness Bender (Defendants' Exhibit 3, R. 98), which shows conclusively that Bender read the meter in Tuffanelli's home on July 2, 1940, and not on July 13th.

The witness's meeting with Tuffanelli on June 8th, was contradicted by defendants' witness, Joseph DeSanto. (R. 96-97.)

If the petitioner had been tried alone on that one Count, as he should have been, he could have argued and questioned quite effectively the credibility of the Government witness, Bender, particularly where an important portion of his testimony is contradicted by his own, official, written entries, made at a time long before he ever knew that he would be called as a witness in this case.

The only evidence introduced by the Government to prove that the petitioner possessed this still is merely an interest displayed by the petitioner therein; such connection with the still is so weak that it easily falls within the doctrine announced by this Court in the case of *United States* v. *Falcone*, 311 U. S. 205, 210, 61 S. Ct. 204, 85 L. Ed. 128, 132. The verdict of guilty against Tuffanelli on this Count could only have been caused by the confusion of the jury in being compelled to deliberate on the guilt or innocence of a number of defendants accused of independent and separate crimes.

It is manifest that *actual* prejudice resulted to the petitioner from the foregoing misjoinder of offenses.

II.

The Error of Joining Several Defendants in a Single Indictment, for Offenses Committed Independently of Each Other, Cannot Be Corrected by Charging Them With Conspiring to Commit Those Substantive Offenses.

The argument under the foregoing Point heading, applies with equal force to the objection here noted.

For the sake of brevity, counsel for the petitioner add hereto, by reference, that portion of the *"Reasons for Granting the Writ"* appearing on pages 11-12 of this Petition entitled *"The petitioner was prejudiced by being joined as a conspirator in an unusual and confusing charge of conspiracy."*

III.

There Was No Evidence to Prove That the Petitioner Carried on the Business of a Distiller of Alcoholic Spirits, at 2332 West Grove Avenue, Blue Island, Illinois, Without Having Given a Bond.

The charge against the petitioner of carrying on the business of a distiller at 2332 West Grove Avenue appears in Count 2. The only evidence to support that charge was the seizure of a set-up still at that address. No materials going into the manufacture of alcoholic spirits were found on the premises. There was no proof of the manufacture of distilled spirits at those premises; there was no proof that any alcohol was ever sold at or from the said premises; no distilled spirits or mash was found on the premises. Under such circumstances was there a "carrying on" of the business of a distiller at that address by the petitioner? And should the petitioner have been convicted of carrying on

the business of a distiller at that address when the only evidence to connect him with the still or the business was merely a display of some concern about shutting off water from the still building?

A decision involving facts closest to the ones under discussion is that of *Gillman* v. *State,* 55 Ala. 248, 250, which held that the phrase of "carrying on" as used in a statute imposing a license tax on any person "engaging in, or carrying on, the business of keeping a theater" means an *actual use* or management of a theater, and hence one who had a hall which he intended to use as a theater, but in which no performance had ever been given, was not within the statute.

The conviction of the petitioner of the crime described in Count 2, without any evidence whatsoever to prove the charge, results in depriving the petitioner of his liberty without due process of law.

In the case of *Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406, this Court held:

> "That the 'known use' by a prosecuting attorney of perjured testimony to obtain a conviction constituted a deprivation of liberty without due process of law."

Certainly, it is equally abhorrent for a defense to be convicted of a charge *without any evidence whatever* to support the same.

IV.

The Circuit Court of Appeals Erred in Affirming the Action of the Trial Court in Amending the Indictment by Sending to the Jury Papers Purporting to Describe the Charges in the Indictment But Which Papers Omitted Material Allegations Thereof.

Count 1 of the indictment accused the petitioner and others with having in their possession, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois, a still set

up for the purpose of distilling alcohol, which still was not then and there registered as required by law. (R. 2.)

Count 2 charged them with carrying on the business of a distiller of alcoholic spirits without having given a bond as required by law, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois. (R. 3.)

Count 3 charged them with carrying on the business of a wholesale liquor dealer without having paid the special tax required by law, on July 12, 1940, at 2332 West Grove Avenue, Blue Island, Illinois. (R. 3.)

The Trial Court sent to the jury certain documents describing the charges in Counts 1, 2, and 3, prepared by Government counsel. These read respectively:

> "Count 1 charges that the defendant, Constant G. Tuffanelli, was in possession of an unregistered still set up, for the purpose of distilling alcohol." (R. 100.)

(The conclusion of this document referred to the statute involved and is omitted here and in the following documents.)

> "Count 2 charges that the defendant, Constant G. Tuffanelli, unlawfully carried on the business of distiller, for the purpose of distilling alcoholic spirits, without having given bond, as required by law." (R. 101.)
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> "Count 3 charges that the defendants, Constant G. Tuffanelli, Stephen Ostrowski, Jr., and Walter J. Bonarski, unlawfully carried on the business of a wholesale liquor dealer without having paid the special tax, as required by law." (R. 101.)

Before sending these papers to the jury, the Trial Court said to the jurors:

> "For your convenience, I have set out tersely and summarized what the different counts in the indictment charge and they will go to your jury room." (R. 110, 111.)

These papers were intended to substitute for the indictment and omitted, in each instance, the place, 2332 West

Grove Avenue, Blue Island, Illinois, where *the indictment* charges the offenses to have occurred.

This allegation was a material part of the indictment; having been set forth therein, the description was a matter of substance and must be proved as alleged. The Circuit Court of Appeals so held in reversing the judgment as to Count 3, because of the variance between the address alleged therein and the proof. In commenting on the proof as to this Count the Court of Appeals observed:

> "The Government proved that on April 13 and May 16, 1940, the appellants sold untaxpaid alcohol, but there was no evidence indicating where the particular liquor came from." (R. 146, 147.)

Nevertheless the jury found the petitioner guilty on Count 3, and it must be definitely assumed that they did so because the Trial Court's amendment of Count 3 permitted them to find that the petitioner carried on the business of a wholesale liquor dealer *anywhere*, rather than at 2332 Grove Avenue.

So, too, with Count 2. Only a still was found at 2332 Grove Avenue; no sale was shown to have been made there; no spirits were proved to have been manufactured there; no materials going into alcohol or mash was found there. Indeed, there is no proof of "carrying on" of the business of a distiller at that address, in the record.

But there was abundant proof of the activities of Bonarski and Ostrowski at the garage at the rear of 12948 Western Avenue. (R. 43.) A number of sales of alcohol were shown to have been made by them, with which Tuffanelli had no connection whatever. (The Court of Appeals reversed the judgment as to the petitioner on Counts 7 and 8.) (R. 148.)

Again it may be assumed that the Trial Court's description of Count 2 permitted the jury to conclude that the business of distiller was carried on at 12948 Western Avenue.

Only a grand jury, by the terms of the fifth amendment to the Constitution of the United States, may indict a person. That indictment cannot be changed by any person.

In *ex parte Bain,* 121 U. S. 1, this Court condemned the action of the Trial Court in striking certain words from an indictment in this language:

> "The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument."

In the Bain case the judgment was held void, after conviction, in *habeas corpus* proceedings.

In the case of *Stewart* v. *United States,* 12 F. (2d) 524 (C. C. A. 9th), *by consent of counsel* for all parties, the Court struck from the body of two Counts of the indictment, as surplusage, the words "feloniously and" in one place and the words "and feloniously" in another place. The Court, after analyzing the case of *ex parte* Bain stated at page 525:

> "* * * no authority exists in a court to amend any part of the body of an indictment, without reassembling the grand jury, unless by virtue of statute."

In the case of *Dodge* v. *United States,* 258 F. 300, 7 A. L. R. 1510, counsel for the Government, at the close of the case moved to strike certain words from the indictment. *Counsel for the defendant at once said: "No objection."* The Court, thereupon struck the requested words. The Circuit Court of Appeals observed: "That it was error of the most serious kind is not to be doubted."

To the same effect is the case of *Naftzer* v. *United States,* (C. C. A. 8th), 200 F. 494, 497.

The petitioner was not tried upon the indictment returned by a grand jury; the Trial Court's action so amended it, that the jury was not confined any longer to the allegations therein. Such action voided all the pro-

ceedings in, and the judgment of, the Trial Court. It deprived the petitioner of the right assured him by the Sixth Amendment that he be tried on an indictment returned by a grand jury.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner.

GEORGE F. CALLAGHAN,
MYER H. GLADSTONE,
Of Counsel.